

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Universal Service Contribution Methodology)	WC Docket No. 06-122
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Five9, Inc.)	
Request for Review)	

**PETITION FOR RECONSIDERATION OF
FIVE9, INC.**

Five9, Inc. (“Five9”) seeks partial reconsideration of the Wireline Bureau’s (“Bureau”) Memorandum Opinion and Order (“*Order*”) that addressed Five9’s appeal seeking credit for its contributions to the universal service fund (“USF” or “Fund”) made through its underlying wholesale providers.¹ In the *Order*, the Bureau properly reversed the decision of the Universal Service Administrative Company (“USAC”) and directed USAC to credit Five9 for its fully documented payments to its wholesale carriers.² The Bureau, however, misinterpreted USAC’s (and the Commission’s) longstanding “pay and dispute” policy, which relieves a contributor of interest and penalty payments for disputed portions of USF invoices when USAC or the Commission concludes that the disputed charges were the result of clear error by USAC.³

¹ Universal Service Contribution Methodology Federal-State Joint Board on Universal Service, WC Docket No. 06-122, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Memorandum Opinion and Order, DA 17-66 (Jan. 13, 2017) (“*Order*”).

² *Id.*, ¶ 27.

³ *Id.*, ¶ 28.

I. BACKGROUND

This matter arises from Five9's voluntary disclosure to the Commission in 2013 that it likely qualified as a telecommunications service provider and, pursuant to the advice of prior legal counsel, had previously acted as a provider of information services. Five9 subsequently registered with USAC and made FCC Form 499-A filings for prior years.⁴ Five9 also requested that, in order to avoid double collection by requiring Five9 to make a second USF contribution for the identical service, USAC grant Five9 a credit for its substantial prior USF payments to its wholesale carriers, which, for the period of 2008-2012, exceeded \$3 million.⁵

USAC declined to grant Five9 a credit for its documented payments to wholesale carriers and instead invoiced Five9 based on all of its interstate and international telecommunications revenues for the period of 2008-2012. Pursuant to Section 54.719 of the Commission's rules, Five9 appealed USAC's decision to the Commission, which formed the basis of the Bureau's *Order*. The Bureau concluded that USAC erred in refusing to consider Five9's evidence that it had made the requisite payments to its wholesale carriers and should be credited for such amounts.⁶ The Bureau directed USAC to credit Five9 following an assessment of Five9's evidence that it made such payments to its wholesale carriers, including an attestation by Five9

⁴ Five9 initially made Form 499-A filings for the period of 2008-2012. USAC subsequently directed Five9 to make additional Form 499-A filings for the period of 2003-2007. Five9 made these filings, but appealed USAC's decision in this regard to the Commission. That appeal remains pending. *See* Request for Review by Five9, Inc. of Decision of Universal Service Administrator and Emergency Request for Stay of Decision of Universal Service Administrator, WC Docket No. 06-122 (Feb. 22, 2013).

⁵ *See* Request for Review by Five9, Inc., WC Docket No. 06-122, Exhibit C (Mar. 15, 2013).

⁶ *Order*, ¶ 28.

regarding the amounts of such payments.⁷ Five9 has since submitted the required attestation to USAC verifying the payments that its wholesale carriers previously affirmed.

In addition, based on discussions with USAC staff in 2013, Five9 entered into a payment plan for the undisputed portion of the USF assessment for 2008 through 2012. Five9 also repeatedly inquired with USAC staff in 2013 and 2014 about its options for handling the disputed portion of the assessment. USAC staff repeatedly instructed Five9 that interest and penalties would be imposed on the disputed assessment, but, pursuant to USAC policy, the interest and penalty charges would be removed if Five9 was successful in its appeal of USAC's refusal to provide credit for its documented payments to its wholesale carriers.

As explained herein, the instructions of USAC staff are fully consistent with USAC's pay and dispute policy and the codification of that policy that the Commission proposed in 2012. Therefore, the Bureau should reconsider and reverse its decision to require Five9 to make interest and penalty payments on USF assessments that USAC improperly imposed.

II. THE PAY AND DISPUTE POLICY DOES NOT REQUIRE THE PAYMENT OF INTEREST AND PENALTIES ON DISPUTED AMOUNTS THAT ARE OVERTURNED BY THE COMMISSION

The Commission's rules do not address the treatment of interest and penalty payments imposed on USF assessments that are successfully challenged by contributors as erroneous. In 2012, however, referencing longstanding USAC policy, the Commission proposed to codify USAC's "pay and dispute" policy as a Commission requirement. The Commission explained that its proposed rule would require that:

⁷ *Id.*

Late fees, interest charges, and penalties for failure to remit any payment by the date due shall apply regardless of whether the obligation to pay that amount is appealed or otherwise disputed unless the Administrator or the Commission (pursuant to section 54.719) finds the disputed charges are the result of clear error by the Administrator.⁸

The Commission never adopted an order codifying this proposed rule, but the draft rule is instructive because it articulates the Commission's interpretation of USAC's pay and dispute policy, which the Commission expressly sought to emulate. In fact, substantively the same language is provided on the USAC website, which explains that "USAC has a pay and dispute procedure for resolving billing and collection issues" and pursuant to this policy, "late payment fees will not be reversed unless USAC has made an error."⁹

The Commission's draft rule is also very instructive because it precisely mirrors the guidance that USAC staff repeatedly provided to Five9 regarding USAC's treatment of interest and penalty assessments for unpaid portions of disputed assessments. Specifically, in 2013, USAC staff explained in the email below that Five9 would be required to pay the interest and penalty assessments on the disputed portion of Five9's USF assessments only if Five9 was ultimately unsuccessful in its appeal to the Commission.

⁸ See Universal Service Contribution Methodology, WC Docket No. 06-122, A National Broadband Plan For Our Future, GN Docket No. 09-51, Further Notice of Proposed Rulemaking, FCC 12-46, ¶ 363 (Apr. 30, 2012) ("*Universal Service Further Notice*") (*emphasis added*).

⁹ Billing Disputes, USAC Official Website, <https://usac.org/cont/payers/billing-disputes.aspx> (last visited Jan. 30, 2016) (*emphasis added*).

From: Michael Lawrence [mailto:mlawrence@usac.org]
Sent: Friday, September 13, 2013 8:26 AM
To: Julie Stiles; Theron Dawson; David Hill
Cc: David Barenburg; Barry Zwarenstein; Marvin Liang (marvinliang@jonesday.com); bsedwards@jonesday.com; delsmith@jonesday.com
Subject: RE: Five9 August invoice payment

Ms Stiles,

We have reviewed your suggested payment proposal, and agree that it's acceptable to pay only your payment plan monthly amount due, and the current charges from Five9's regular monthly contributor invoice. Since we have a Pay and Dispute policy, if you choose not to pay the amounts under appeal, Five9 will be responsible for any interest and penalties that have accrued on that debt, in the event that the appeal is denied.

Also, both the contributor payment and payment plan payments are due in our lockbox today. If we do not see the payment, Five9's payment plan will be in default.

Thanks!

Mike Lawrence
Collections Manager
Universal Service Administrative Company
202-772-5249

USAC staff provided this same guidance to Five9 six months later, clearly explaining in the email below that the interest and penalty assessments on the disputed portion of the invoiced USF charges would be withdrawn if Five9 was successful in its appeal to the Commission.

From: Michael Lawrence [mailto:mlawrence@usac.org]
Sent: Monday, February 03, 2014 1:19 PM
To: Julie Stiles
Cc: David Barenburg; Barry Zwarenstein; Theron Dawson; David Hill; Roberta Jester
Subject: RE: Interest and Penalties

Hi Ms Stiles,

1 and 2. If Five9's appeal is decided in their favor, the account will be re-calculated to take into account what was paid, what should not have been invoiced (I&P waived on appealed debt IF granted), and what those payments were actually meant for (post appealed billings).
3. While Five9 is under appeal, we do not have the ability to break out current charges from appealed delinquencies, so there is no Red Light.

Hope this helps!

Michael Lawrence
(202)772-5249
mlawrence@usac.org | www.usac.org

In bringing these emails to the attention of the Bureau, Five9 is not asserting that it should be permitted to rely on their substance. Five9 is aware of Commission policy that a reliance interest does not result from the informal guidance of Commission or USAC staff.¹⁰ Instead, the above emails provide clear evidence of USAC's interpretation of its pay and dispute policy. Importantly, the emails reinforce the identical interpretation of that policy that was expressed by the Commission in its *Further Notice*.

This interpretation of the pay and dispute policy is also consistent with the Commission's longstanding interpretation of a related Commission policy, the Red Light Rule. Like the pay and dispute policy, the Red Light Rule was adopted as part of the Commission's efforts to implement the Debt Collection Improvement Act ("DCIA").¹¹ The Commission has explained that "where an applicant has filed a timely administrative appeal, or a contested judicial proceeding, challenging either the existence of, or the amount of, a debt, such debt shall not be considered delinquent for purpose of the red light rule."¹² The Red Light Rule imposes respect for the Commission's collection processes, while allowing for the operation of the appeal process without penalizing disputants. In the context of the pay and dispute rule, the Bureau should recognize that a debt that is ultimately found to be invalid should "not be considered delinquent" for the purposes of late fees under the pay and dispute rule.

¹⁰ See, e.g., Letter from Sharon E. Gillett, Chief, Wireline Competition Bureau, to Richard A. Belden, Chief Operating Officer, Universal Service Administrative Company, DA 11-591 at 2 n.9 ("The Commission has repeatedly held that carriers cannot rely on informal staff guidance").

¹¹ Order, ¶ 28 n. 92 (citing to the DCIA as a basis for the pay and dispute policy).

¹² Amendment of Parts 0 and 1 of the Commission's Rules, MD Docket No. 02-339, Implementation of the Debt Collection Improvement Act of 1996 and Adoption of Rules Governing Applications or Requests for Benefits by Delinquent Debtors, FCC 04-72, ¶ 9 (2004).

In reaching a contrary result, the Bureau cited to two cases in which USF contributors were required by the Commission to pay interest and penalties on unpaid USF assessments even though the underlying assessments upon which the interest and penalties were based were withdrawn by USAC at the Commission's direction.¹³ In each of those cases, the basis for the unpaid USF assessment was an error by the USF contributor in calculating and reporting its projected USF revenues with no accompanying error by USAC.¹⁴ This is fully distinguishable from Five9's case in which the unpaid USF assessment resulted from USAC's erroneous refusal to avoid double collection by crediting Five9's substantial USF payments through its wholesale carriers.

In a more recent case that was not cited in the *Order*, the Bureau overturned USAC in its refusal to accept a late-filed 499-Q from a carrier that would have corrected the erroneous addition of an extra zero to its projected end-user interstate revenue.¹⁵ In directing USAC to accept the amended 499-Q—effectively a finding of error by USAC—the Bureau noted that USAC would withdraw the interest and penalties on the disputed amount, explicitly explaining

¹³ *Order*, ¶ 28 n.92 (citing Emergency Request for Review of Universal Service Administrator Decision by Level 3 Communications, LLC, et al., WC Docket No. 06-122, *Order*, DA 10-187, ¶ 9 (2010) (“*Level 3 Denial*”); Universal Service Contribution Methodology; Requests for Waiver of Decisions of the Universal Service Administrator by Achieve Telecom Network of Massachusetts, LLC, et al., WC Docket No. 06-122, *Order*, DA 08-2695 (2008) (“*Ascent Denial*”).

¹⁴ In the *Level 3 Denial*, incorrect Form 499-A data resulted in USAC invoicing Level 3 more USF contributions than was warranted for a period of several months. Although USAC ultimately credited Level 3 after processing its revised Form 499-A data, the Commission refused to waive the interest and penalties accrued on Level 3's underpayment, citing the pay and dispute policy. *Level 3 Denial*, ¶¶ 5-9. In the *Ascent Denial*, Ascent's conceded that its error in failing to comply with the 45-day revision deadline was the cause of the overcharge. *Ascent Denial*, ¶¶ 7-9.

¹⁵ See also Universal Service Contribution Methodology, WC Docket No. 06-122, Request for Review of a Decision of the Universal Service Administrator and Request for Waiver by American Broadband & Telecommunications, *Order*, DA 13-1608 (2013).

that acceptance of the late filing would “have the effect of reversing the interest and penalties associated with the erroneously reported revenue.”¹⁶

This case is analogous to Five9’s situation because in both cases, the Commission overturned on appeal a USAC decision regarding disputed USF assessments. As the Bureau correctly concluded, pursuant to the Commission’s policy against double collection, Five9 was entitled to credit for its fully documented payments to its wholesale carriers.¹⁷ Therefore, the Bureau should reconsider its *Order* and, consistent with the longstanding policy of USAC and the Commission, direct USAC to withdraw the interest and penalty charges on the disputed assessments to the extent that USAC concludes that Five9 has adequately demonstrated that they are duplicative of prior USF payments made to its wholesale carriers.

III. ENFORCEMENT OF THE PAY AND DISPUTE POLICY AS A RULE WOULD VIOLATE THE ADMINISTRATIVE PROCEDURE ACT

Any substantive rule adopted by a federal agency must comply with the APA. The APA requires that the agencies follow prescribed procedures, including publishing notice of a proposed rule and providing time for interested parties to submit comments before a final rule is adopted and enforced.¹⁸ A federal agency may only “establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents.”¹⁹ As noted above the Commission has considered adopting pay and dispute as a Commission rule, but did not do so.

¹⁶ *Id.*, ¶ 14.

¹⁷ *Order*, ¶ 26.

¹⁸ 5 U.S.C. § 553.

¹⁹ *Pacific Gas & Electric Company v. Federal Power Commission*, 506 F.2d 33, 38 (D.C. Cir. 1974).

Assuming, arguendo, that the Commission's general acknowledgements of the pay and dispute policy were intended to be an expression of a Commission policy, this is insufficient to create a binding regulation. Although a "properly adopted substantive rule establishes a standard of conduct which has the force of law, ...[a] general statement of policy, on the other hand, does not establish a 'binding norm.' It is not finally determinative of the issue or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law."²⁰ Therefore, even if had it represents standing Commission "policy," the pay and dispute policy would still not be a rule with binding effect on carriers.

Nor can the Bureau adopt policy by classifying USAC appeals as adjudications. The Commission has reserved the authority to resolve novel questions of law and policy.²¹ It has only delegated authority to Bureaus to apply existing law and policy in specific instances.²² Because the Commission has not determined, through rulemaking or adjudication, that a pay and dispute policy is necessary for the predictability of the Fund and is consistent with the principle of equitable and nondiscriminatory contributions, there is no Commission standard for the Bureau to apply. Instead, the Bureau should acknowledge that pay and dispute is an informal policy, created, defined, and administered by USAC staff, who have provided clear and consistent explanations of the operation of the policy in this case.

IV. CONCLUSION

The Commission's longstanding pay and dispute policy is clear and stark: Entities that engage in self-help by withholding USF payments will be liable for all interest and penalties

²⁰ *Id.* at 38.

²¹ 47 C.F.R. § 54.723(b).

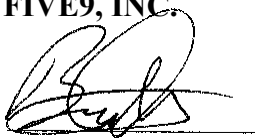
²² 47 C.F.R. § 54.723(a), § 0.291(a)(2).

accrued on the overdue amounts, regardless of whether the obligation to pay that amount is appealed or otherwise disputed. The only exception to this policy is a finding that the disputed charges are the result of error by USAC. The Commission acknowledged such an error in Five9's case when it directed USAC to consider Five9's evidence that it had made requisite payments to its wholesale carriers and credit Five9 for these payments as warranted by the evidence. Thus, the most logical, legal, and equitable outcome, as directed by the Commission's clearly and repeatedly articulated policy, is for the Commission to void the fees accrued on USF assessments that USAC erroneously imposed and that Five9 not be obligated to pay interest and penalties on payments that the Bureau has acknowledged it did not owe.

Respectfully submitted,

FIVE9, INC.

By:



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February 13, 2017

CERTIFICATE OF SERVICE


I, Bruce A. Olcott, hereby certify that on February 13, 2017, I caused a copy of the foregoing Petition for Reconsideration of Five9, Inc. to be served by U.S. first-class mail, postage paid, upon each of the following:

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